IN THE HIGH COURT OF BOMBAY AT GOA

CIVIL REVISION APPLICATION NO. 11 OF 2007.

M/s Indana International Ltd.
Registered Office,
72, Janpath,
New Delhi – 110001. .... Petitioner.

Versus

1. Smt. Santana Miguel Fernandes,
   Resident of Mandrem,
   Pernem, Goa.

2. Miss Apolonia Miguel Fernandes,
   Major in age,
   resident of Mandrem, Pernem,
   Goa. .... Respondents.

Shri P. Rao, Advocate for the Petitioner.

CORAM: S. A. BOBDE, J.

DATE: 20th APRIL, 2007.

ORAL JUDGMENT:

Admit.

The decision in this revision application must necessarily be ex-parte since there are no living respondents and the petitioner/plaintiff has been denied permission to withdraw the suit filed by him against dead persons, who are arrayed as Respondents here. The matter is therefore dealt with in exercise of the extraordinary jurisdiction of this Court in addition to the revisional jurisdiction under Section 115 of the Code of Civil Procedure.

2. This Civil Revision Application is directed against the Order dated 5.10.2006 refusing permission to the petitioner to withdraw Civil Suit No. 29/05/B. By the impugned order the learned trial Court has refused permission to the plaintiff to withdraw the suit with liberty to file a fresh suit against the legal representatives.

3. The petitioner had sought permission to withdraw the suit against the defendants Smt. Santana Miguel Fernandes and Miss Apolonia Miguel Fernandes i.e. Respondents No.1 and 2 here, on the ground that they were dead when the suit was filed. It appears that the Bailiff report on the summons issued to the defendants also shows that the defendants have expired. In these circumstances, the plaintiff expressed his intention to withdraw the suit with permission to file a fresh suit on the same cause of action. This request has been rejected on the ground that a suit against a dead person is a nullity and his legal heirs cannot be brought on record. According to the learned trial Court to filing of a suit against a dead person being a nullity cannot be said to be a formal defect under Order 23, Rule 1(3) of C.P.C.

Order 23 Rule 1(3) reads as follows :-

> **" (1) Withdrawal of suit or abandonment of part of claim.--** (3) Where the Court is satisfied -
> (a) that a suit must fail by reason of some

formal defect, or

(b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim, it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of the claim. “

4. The learned trial Court has made a correct observation that the legal heirs of a sole defendant who is dead, cannot be brought on record, since the suit against a dead person itself is a nullity. In fact, it appears that to prevent this, that the plaintiff sought to withdraw the suit itself, which has been denied on the ground that the suit is a nullity.

5. Undisputedly, such a suit must be held to be a nullity and therefore not instituted at all. However, it does not follow that the fact that a suit has been filed upon payment of Court fees must be ignored. In such a case, the withdrawal that is sought by the plaintiff must be viewed as a request for withdrawal of the filing of the suit which is the physical aspect of the suit. For this purpose therefore, filing of the suit against a dead person must be treated to be a formal defect within the meaning of order 23 Rule 1(3) since the defect is in the nature of misjoinder and non-joinder.

6. In this regard the decision in the case of ***Ramrao Bhagwantrao Inamdar and another v. Babu Appanna Samage and others*** reported in **A.I.R. 1940 Bombay 121** relied upon by the learned counsel for the petitioner of this Court may be considered applicable. The Full Bench has observed that the expression "formal defect" must be given a wide and liberal meaning, and must be deemed to connote every kind of defect which does not affect the merits of the case, whether that defect be fatal to the suit or not, relying on a decision of the Privy Council in the case of **Robert Watson & Co. v. Collector of Zillah Rajshahye** (1869) 13 M I A 160 in which the Privy Council cites an instance of mis-joinder of parties as a formal defect.

7. In this view of the matter, the revision petition must succeed. The petitioner is allowed to withdraw the Civil Suit filed by him with liberty to file a fresh suit in accordance with law under Order 23 Rule 1(3) of C.P.C.

8. Revision Petition is therefore allowed. Civil Application No.100/07 accordingly stands disposed of.

S. A. BOBDE, J.

sl.